**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**MARSHALL DIVISION**

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| TOUCHSTREAM TECHNOLOGIES, INC.,<br><br>*Plaintiff*,<br><br>v.<br><br>CHARTER COMMUNICATIONS, INC., et al.,<br><br>*Defendants*. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. 2:23-CV-00059-JRG-RSP<br>(Lead Case) |

**REPORT & RECOMMENDATION**

Before the Court is the Charter Defendants' Motion for Summary Judgment of Noninfringement. **Dkt. No. 87.** For the reasons discussed, the Motion should be **DENIED**, except with respect to set-top boxes (STBs) with SARA or Passport guides.

## I. LEGAL STANDARD

### A. Summary Judgment

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any evidence must be viewed in the light most favorable to the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)). Summary judgment is proper when there is no genuine dispute of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* [dispute] of material fact." *Anderson*, 477 U.S. at 247–48 (emphasis added). The substantive law

identifies the material facts, and disputes over facts that are irrelevant or unnecessary will not defeat a motion for summary judgment. *Id.* at 248. A dispute about a material fact is "genuine" when the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party must identify the basis for granting summary judgment and evidence demonstrating the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323.

"If the moving party does not have the ultimate burden of persuasion at trial, the party 'must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.'" *Intellectual Ventures I LLC v. T Mobile USA, Inc.*, No. 2:17-CV-00577-JRG, 2018 WL 5809267, at *1 (E.D. Tex. Nov. 6, 2018) (quoting *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000)).

## II. ANALYSIS

### A. STBs With Certain Guides

#### 1. SARA and Passport Guides

Charter argues that SARA and Passport guides cannot infringe. Dkt. No. 87 at 8. Touchstream does not oppose this. Dkt. No. 123 at 16. Accordingly, this portion of the Motion should be **GRANTED**.

#### 2. Spectrum Guide

Charter argues that each of the various modes of STBs with Spectrum Guide do not infringe. Dkt. No. 87 at 9–10.

*i. Linear TV Mode*

First, Charter asserts that "[w]hen a STB with Spectrum Guide is in Linear TV mode, messages from the personal computing device (e.g., phone) as well as messages to the STB specify only a channel, not any particular piece of content." *Id.* at 9. Thus, they argue that the claim limitations in '251 claim 1, '751 claim 12, and '934 claim 17 cannot be met because they all require the STB to receive pieces of content. *Id.* Touchstream responds that Charter's assertion is belied by evidence from Charter's corporate witness and Touchstream's expert. Dkt. No. 123 at 20–21. For example, Touchstream cites Mr. Frusciano's testimony that the STB receives certain identifiers that include the channel number and call sign. *Id.* at 20; *see also* Dkt. No. 181 at 2. Dr. Wicker, Plaintiff's expert, also opines that the STB receives these identifiers. *Id.* at 21. The Court finds that Plaintiff has adduced sufficient evidence of infringement to survive summary judgment as to this mode.

*ii. VOD Mode*

Next, Charter argues that STBs with Spectrum Guide in VOD mode do not infringe. Dkt. No. 87 at 9. Charter asserts that this is because a user cannot play VOD content on the STB directly from their phone but must use the remote control to start playing the video. *Id.* at 9–10. Touchstream disputes this assertion. Dkt. No. 123 at 19–20. Although Touchstream concedes that Dr. Wicker did not test the Spectrum Guide variety, but instead tested a different variety based on Charter's representation that the guides work the same, Dr. Wicker nevertheless concluded that the Spectrum TV app could control playback of VOD on Spectrum Guide STBs. *Id.* Charter now disagrees that the different guides function in the same way for this mode and argues that Touchstream cannot rely on Dr. Wicker's tests because he did not directly test the Spectrum Guide variant. Dkt. No. 153 at 2. There is no requirement that a party's expert directly test all accused

products. The Court finds that Touchstream has provided sufficient evidence that the Spectrum Guide STBs are capable of infringement in VOD mode. Any disputes here go to the weight of the evidence and thus this portion of the Motion should be **DENIED**.

*iii. DVR Mode*

Next, Charter argues that the Spectrum Guide in DVR mode does not infringe. Dkt. No. 87 at 10. It asserts that the user cannot use the app to view DVR-recorded content. *Id.* Touchstream responds that there is ample evidence that the app can control DVR playback. Dkt. No. 123 at 18. It points to Charter corporate witness testimony, and Dr. Wicker's report. *Id.* at 18–19 (citing Dkt. No. 123-7, ¶ 145). The Court finds that a genuine dispute of fact exists here and thus precludes summary judgment.

**B. '251 Patent**

Next, Charter argues that it does not infringe the '251 patent. Dkt. No. 87 at 10.

1. "Assigning, by a Server System"

It argues that the Charter server system does not assign the STB's MAC address to the STB, as required by the claim because the STB's MAC address is hard-wired into the STB during manufacture. *Id.* at 11. Touchstream responds that when an STB connects to Charter's network, Charter's servers obtain the MAC address from the STB and assign it to the STB for use within the network. Dkt. No. 123 at 22 (citing Dkt. No. 123-7, ¶ 125). The Court agrees with Plaintiff that the hard-wiring of the MAC address into the STB during manufacture does not preclude infringement of this claim.

2. "Record Establishing an Association"

The '251 claim 1 requires a "record establishing an association between the personal computing device and the display device based on the synchronization code." Charter argues that

"[t]here is no record stored on Charter's system of any association . . . between the accused display device (STB) and the user's personal computing device (e.g., phone)," as the claim requires, instead Charter's system creates an association between the STB and the user's account. Dkt. No. 87 at 12 (emphasis removed). Touchstream responds that "Charter's servers store records associating a Charter's customer's mobile device with an STB through the user account system." Dkt. No. 123 at 24 (citing Dkt. No. 123-7, ¶¶ 127–28). Touchstream illustrates that this user account information then points to the user's personal computing device. *Id.* Thus, according to Touchstream, Charter has stored a record establishing an association between a personal computing device and the display device based on the synchronization code. *Id.* The Court finds that Touchstream has adduced sufficient evidence that Charter infringes the asserted claim and thus Charter is not entitled to summary judgment of non-infringement.

**C. '751 Patent**

Next, Charter argues that it does not infringe the '751 patent. Dkt. No. 87 at 13.

1. "Obtaining, by the Content Presentation Device"

Charter presents a similar argument to its argument for non-infringement of the '251 patent, above. *Id.* Namely, that because the STB's MAC address is hard-wired into the STB during manufacture it cannot obtain a MAC address as Dr. Wicker suggests. *Id.* Touchstream responds like it did for the '251 patent. Dkt. No. 123 at 26. For the same reasons as discussed above, the Court finds that Charter's argument is unavailing, and summary judgment is inappropriate.

**D. '934 Patent**

For the last patent, Charter argues that it cannot infringe since the claim requires "providing by a media receiver, a unique identifier of the media receiver to a computing device in communication with a server system," but "the STB does not provide its MAC address to the

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